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Supreme Court, U.S.
FILED
FEB 6 1991
OFFICE OF THE CLERK

No. 90-1122

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

JEROME GOLOCHOWICZ,

Petitioner,

v.

HENRY GRAYSON, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I

WAS PETITIONER EFFECTIVELY NOTIFIED THAT HE COULD BE FOUND GUILTY OF FIRST-DEGREE FELONY MURDER WHEN HE WAS CHARGED IN AN INFORMATION ON AN OPEN CHARGE OF MURDER UNDER MICHIGAN LAW?

II

DID A REMARK MADE BY THE TRIAL JUDGE AT SENTENCING REQUIRE THE JUDGE TO DISQUALIFY HIMSELF FROM A LATER POST-TRIAL HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL?

III

WAS PETITIONER DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL?

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STATE STATUTORY PROVISIONS

MCL 750.316: text quoted in Petition for Writ of Certiorari, p 3.

MCL 767.44:

The following forms may be used in the cases in which they are applicable but any other forms authorized by this or any other law of this state may also be used:

Adultery--A. B., a married man, committed adultery with C. D.; or A. B. committed adultery with C. D., a married woman.

Affray--A. B. and C. D. made an affray.

Assault--A. B. assaulted C. D.

Assault and Battery--A. B. committed an assault and battery on C. D.

Assault with intent--A. B. assaulted C. D. with intent to murder, or kill, or rob, or maim, or rape (as the case may be).

Arson--A. B. committed arson by burning the dwelling house of C. D.

Attempt--A. B. attempted to steal from C. D.; A. B. attempted to commit larceny of the goods of C. D.; A. B. attempted to commit burglary of a building belonging to C. D. (as the case may be).

Burglary--A. B. committed burglary of the house of C. D. A. B. broke and entered the dwelling house of C. D. in the night time with intent to commit larceny, or murder, or robbery therein (as the case may be).

Conspiracy--A. B. and C. D. conspired together to murder E. F. or to steal the property of E. F. or to rob E. F. (as the case may be).

Forgery--A. B. forged a certain instrument purporting to be a promissory note (or describe instrument or give its tenor or substance).

Larceny--Embezzlement and false pretenses. A. B. stole from C. D. 1 horse of the value of more than 100 dollars.

Murder--A. B. murdered C. D.

Manslaughter--A. B. killed C. D.

Perjury--A. B. appeared as a witness in a case between C. D. and E. F. being heard before the (set forth the tribunal) and committed perjury by testifying as follows: (set forth the testimony).

Rape--A. B. raped or ravished C. D.

Rape (statutory)--A. B. raped or ravished C. D., she C. D. being then under the age of (statutory age) years.

Robbery Armed--A. B. robbed C. D., A. B. being armed.

Robbery--A. B. robbed C. D., A. B. not being armed.

Provided, That the prosecuting attorney, if seasonably requested by the respondent, shall furnish a bill of particulars setting up specifically the nature of the offense charged.

MCL 767.71:

In all indictments for murder and manslaughter it shall not be necessary to set forth the manner in which nor the means by which the death of the deceased was caused; but it shall be sufficient in any indictment for murder to charge that the defendant did murder the deceased; and it shall be sufficient in manslaughter to charge that the defendant did kill the deceased.

STATEMENT OF THE CASE

On November 1, 1975, Donald Mitchell was found dead at his home, having been strangled to death with the belt from his bathrobe. (Trial Tr., Vol. I, 50-56, 162). There were no eyewitnesses to the killing. Petitioner was ultimately arrested and charged with the murder based upon a strong case of circumstantial evidence. Petitioner's fingerprints were found in Mitchell's condominium. (Trial Tr., Vol. II, 30-38). Petitioner was in possession of and sold a number of items taken from the victim's home at the time of the murder, including the victim's yellow Lincoln Continental automobile and stereo speakers. (Trial Tr., Vol. I, 194-197, 234, 239-240; Vol. II, 120-123). Petitioner also used credit cards taken from the victim (Trial

Tr., Vol. I, 179-190), and forged the victim's signature and cashed checks taken from the victim's stolen checkbock. (Trial Tr., Vol. I, 199-202).

Petitioner was first tried for Mitchell's murder in 1977 and was jury convicted of first-degree murder. Although the Michigan Court of Appeals affirmed the conviction, People v Golochowicz, 89 Mich App 57; 279 NW2d 576 (1979), it was later reversed by the Michigan Supreme Court because evidence of another uncharged murder allegedly committed by Petitioner was erroneously admitted at trial under Michigan's "similar acts" evidence rule. People v Golochowicz, 413 Mich 298; 319 NW2d 518 (1982).

After Petitioner's first conviction was reversed and the case remanded, a new

preliminary examination was held and Petitioner was bound over for trial on an open charge of murder pursuant to MCL 767.44 and 767.71. The prosecution then filed an information charging that Petitioner "did murder Donald Havens Mitchell" and citing Michigan's first-degree murder statute, MCL 750.316.

In opening argument, it appeared that the prosecution was proceeding on a premeditated murder theory. (Trial Tr., Vol. I, 33). At the end of the case, however, the prosecution asked for and received, over objection, a felony murder instruction. An instruction on premeditated murder was also given. (Trial Tr., Vol. III, 72-76). The jury found Petitioner guilty of felony murder.

The second conviction was appealed and was upheld by the Michigan Court of

Appeals in an unpublished opinion. The Michigan Supreme Court declined to review. In 1988, Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. Habeas corpus relief was denied by the district court in a memorandum opinion and judgment entered August 29, 1989. The United States Court of Appeals for the Sixth Circuit affirmed the denial in an unpublished per curiam opinion and order entered October 22, 1990.

REASONS FOR DENYING THE WRIT

THE PETITION PRESENTS NO IMPORTANT UNSETTLED QUESTION OF FEDERAL LAW AND THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER UNITED STATES COURTS OF APPEALS.

In this habeas corpus proceeding, Petitioner alleges that he was denied fair notice that he could be convicted of felony murder when he was charged with murder in the common-law form under Michigan's "open murder" statute. This Court established long ago that such a claim is purely a matter of state law in Bergemann v Backer, 157 US 655 (1895), and Kohl v Lehlback, 160 US 293 (1895). Petitioner also alleges that the trial judge should have disqualified himself from a post-trial hearing and that Petitioner was denied the effective assistance of counsel. The legal princi-

ples involved in evaluating recusal of a judge are clearly established in United States v Grinnell Corp., 384 US 563 (1966), and the legal principles involved in evaluating claims of ineffective assistance of counsel are clearly established in Strickland v Washington, 466 US 668 (1984).

Petitioner does not challenge any of these controlling legal principles, and it is clear that the outcome of his case depends solely upon the application of those principles to the unique facts of Petitioner's 1983 trial. Respondent submits that there are no conflicts among the United States Circuit Courts of Appeal as to Petitioner's first issue, as Petitioner claims. Rather, the differences in the Courts' decisions reflect constitutionally permissible differences

in state law regarding the wording of first-degree murder charges. Respondent further submits that Petitioner's allegations were very carefully and correctly evaluated by both the Michigan courts and by the federal courts in this habeas corpus proceeding, and it is clear that there was no constitutional error.

A. Petitioner Was Not Denied Fair Notice That He Could Be Found Guilty Of First-Degree Felony Murder Under Michigan's First-Degree Murder Statute.

In Bergemann v Backer, 157 US 655 (1895), this Court upheld the constitutionality of a conviction of first-degree murder where the appellant had been charged with open murder under a state statutory scheme virtually identical to Michigan's. Accord, Kohl v Lehlback, 160 US 293 (1895). The appellant in

Bergemann was charged under an indictment stating that, on a day and within the county named, he "did willfully, feloniously, and of his malice aforethought kill and murder" the victim. Bergemann, 157 US at 655. Bergemann claimed that his New Jersey conviction of first-degree murder on that charge was unconstitutional, as the charge gave him notice only of second-degree murder.

This Court held that whether the indictment sufficiently charged first-degree murder was a question of state law. Id., at 656. The Court quoted the language of New Jersey's first-degree murder statute and its open murder statute, which are virtually identical to MCL 750.316 and MCL 767.71, the open murder statutes of both states encompassing both first-degree premeditated murder and

felony murder committed in the course of several enumerated felonies. This Court concluded that an open murder charge, where permitted by state law, is consistent with the due process of law required by the Fourteenth Amendment:

> "[A]n indictment charging, in a general form, the perpetration of murder, without indicating which of the two felonies into which that offense was divided by the statute, was sufficient to fulfill the constitutional requirement of informing the defendant of the nature and cause of the accusation against him. The effect of the statute ... was neither to add any case to nor take any case from the class of crimes which, at common law, was denominated murder, for every act that was murder at common law was still murder in New Jersey. What the statute effected ... was to distribute the offense into two classes for the sake of adjusting the punishment."

Bergemann, supra, at 657 [citing Graves v State, 45 NJL 203 (1894)]. Accord, People v Potter, 5 Mich 1 (1858); People v Scott, 6 Mich 287 (1859).

Petitioner was charged with first-degree murder in an information which contained both the short form language permitted by the "open murder" statutes, MCL 767.44; MCL 767.71 ("Defendant did murder Donald Havens Mitchell") and a citation to the first-degree murder statute, MCL 750.316. Michigan's first-degree murder statute encompasses both first-degree premeditated murder and first-degree felony murder:

> "Murder which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration , or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping, is murder of the first degree, and shall be punished by imprisonment for life."

Petitioner contends that an unconstitutional amendment of the information

occurred when the trial judge instructed the jury on first-degree felony murder. Petitioner claims that he was denied fair notice that he could be convicted of first-degree felony murder when he was bound over for trial on a charge of open murder and when the prosecution referred only to first-degree premeditated murder in opening argument. The courts below rejected this contention, finding that under Michigan law, open murder charges are permitted and Michigan defense lawyers would expect the prosecution to proceed on whatever murder theories the evidence would support.

In Michigan, informations charging open murder or murder of an unspecified degree have long been common in practice, Brownell v People, 38 Mich 732 (1878), and are permitted by statute, MCL 767.44

and 767.71. When a person is indicted on an open murder charge, upon finding that person guilty of murder, the jury must then determine the degree of murder. People v Johnson, 427 Mich 98; 398 NW2d 219 (1986). An open murder charge will support a conviction of first-degree premeditated murder, second-degree murder, or, as in this case, first-degree felony murder. People v McKinney, 65 Mich App 131; 237 NW2d,215 (1975). Accord, People v Page, 198 Mich 524; 165 NW 755 (1917); People v Turner, 26 Mich App 632; 182 NW2d 781 (1970).

In People v Johnson, supra, the Michigan Supreme Court reiterated that murder is a single offense under the open murder statute and that at the information stage of proceedings, only a charge that the defendant murdered the deceased need be set forth.

Under Michigan law, as the state trial judge properly instructed the jury, in order to find a defendant guilty of murder in the first degree, it is first necessary that the jury find all of the elements of second-degree murder. These include that the defendant "intended to kill, that is he intended to do great bodily harm, or that he committed a wanton and wilful act, the natural tendency of which is to cause death or great bodily harm." (Trial Tr., Vol. III, 72-75). This element, commonly referred to as the "malice" element, is necessary for a felony-murder conviction in Michigan. People v Aaron, 409 Mich 672; 299 NW2d 304 (1980).

Thus, when Petitioner was charged under MCL 750.316, he was on notice that he was charged with an intentional kill-

ing with malice (second-degree murder), which was aggravated to first-degree murder by either premeditation or the commission of one of the felonies enumerated in section 750.316, which includes larceny.

Petitioner also knew, by virtue of the first trial and the preliminary examination that preceded the second trial, that larceny would be an important element of the prosecution's circumstantial case, since it was Petitioner's possession and use of the victim's stolen goods and his attempts to sell some of them that formed a substantial part of the evidence against him.

Petitioner's reliance upon Russell v United States, 369 US 749 (1962), Schmuck v United States, 489 US 705 (1989),

Watson v Jago, 558 F2d 330 (6th Cir, 1977) and Givens v Housewright, 786 F2d 1378 (9th Cir, 1986), is misplaced. Unlike Russell and Schmuck, the instant case does not involve a criminal charge returned by a grand jury. The law regarding amendments to indictments and variances in proof from the charges is very strict, in recognition of the fact that it is the grand jury, and not the prosecutor, who accuses the defendant. By contrast, Fed. R. Crim. P. 7(e) allows a federal prosecutor's information "to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Respondent is aware that this case is not governed by Rule 7, but the distinction is obvious as between an

indictment and an information, and the record fails to show any prejudice to Petitioner in the sense that he was deprived of fair notice and an opportunity to defend.

In addition, Schmuck deals only with the issue of the proper test to be used to determine when a defendant is entitled to a jury instruction on a lesser included offense under Fed. R. Crim. P. 31(c). No issue of fair notice was decided in that case.

Watson and Givens, supra, also do not control, and the decision of the Sixth Circuit below is not in conflict with that of the Ninth Circuit in Givens. In Watson, the habeas petitioner was indicted on first-degree murder with deliberate and premeditated malice, but

was convicted of second-degree murder. At trial, the prosecutor introduced a theory of felony murder. Under Ohio law, a felony murder conviction cannot be sustained under an indictment charging first-degree murder with deliberate and premeditated malice. Watson, 558 F2d at 334. Therefore, the Sixth Circuit found that the petitioner was improperly denied notice of the prosecution's felony murder theory.

In the instant case, in contrast, Petitioner was charged under the Michigan open murder statute which does permit conviction of either first-degree premeditated murder or felony murder. The instant case is analogous to Blake v Morford, 563 F2d 248 (6th Cir, 1977), cert den, 434 US 1038 (1978). In Blake, the Sixth Circuit held that since

Tennessee, like Michigan, charges murder in the common-law form, a person can be convicted of first-degree felony murder even when the indictment charges only first-degree premeditated murder without resulting in a constructive amendment. 563 F2d at 251. The court held that Blake was not deprived of fair notice because under Tennessee law, he was not tried and convicted for a crime not charged in the indictment. Id., at 252. The same is true in the instant case.

Givens v Housewright, supra, involved a Nevada first-degree murder prosecution in which the trial judge instructed the jury on two types of first-degree murder: murder by torture and premeditated murder. The significant difference between the two is that in a murder-by-torture prosecution there need be no

intent to kill. Givens maintained the information did not give him adequate notice that he would face a charge of murder by torture. Although the state courts and the federal district court found no violation of state law or federal due process, the Ninth Circuit granted the habeas petition. The court's decision was based on the fact that Givens had structured his defense on lack of intent to kill. He was thus prejudiced at the conclusion of the case with the addition of the murder by torture instruction because lack of intent is not a defense to that charge.

Both the Ninth and Sixth Circuits agree that actual prejudice resulting from an amendment to the charge must be shown before a petitioner is entitled to the writ of habeas corpus. See, e.g.,

Givens, supra, 786 F2d at 1381; Gray v Raines, 662 F2d 569, 574 (9th Cir, 1981); Martin v Foltz, 773 F2d 711, 717 (6th Cir, 1985); Koontz v Glossa, 731 F2d 365, 369 (6th Cir, 1984).

In the instant case, both the Sixth Circuit and the district court correctly concluded that Petitioner was not prejudiced by the felony murder instruction. Since it was clear that a larceny had been committed, and likely that a jury would conclude that a strangulation killing was a direct result of someone acting with an intent to kill, Petitioner, by way of defense, attempted to convince the jury that he was not involved at all. This was a reasonable defense, since there were no eyewitnesses who could directly connect Petitioner with the crime. This defense was equally applica-

ble to both the premeditated murder and felony murder theories. Thus, Petitioner's constitutional rights were not violated.

B. Petitioner Was Not Denied A Fair Hearing On Ineffective Assistance Of Counsel By The Trial Judge's Refusal To Disqualify Himself.

Following Petitioner's 1983 conviction, the Michigan Court of Appeals remanded the case to the trial court for a hearing on Petitioner's claim of ineffective assistance of counsel. Previously, at sentencing on February 15, 1983, Petitioner made an oral motion for new trial in propria persona in the presence of his trial counsel. The following colloquy took place:

> "DEFENDANT: ... [A]t this time, I'd like to present an oral motion for new trial, pertaining to the case. I have several issues which support my motion.

"THE COURT: How lengthy is your motion going to be?

"DEFENDANT: It will only be a couple minutes.

"My first issue is ineffective assistance on behalf of my State Appointed lawyer, Mr. William Wolfram.

"THE COURT: The motion on that will be denied. You were very capably represented by counsel.

"DEFENDANT: I take exception to your denial.

"THE COURT: I understand that. You may appeal on that."

(Trial Tr., Vol. III, 103-104).

The judge also suggested that Petitioner could bring a formal written motion on the matter if he wished (Trial Tr., Vol. III, 104-105). An evidentiary hearing on ineffective assistance of counsel was held before the same trial judge eight months later, on October 18, 1983. Petitioner's motion for new trial was denied. Petitioner claims that the

judge's comment at sentencing that he was "very capably represented by counsel" evidenced bias and required the judge to disqualify himself from presiding at the evidentiary hearing.

To be disqualifying, alleged bias and prejudice of a judge must stem from an extrajudicial source and must result in an opinion based on something other than what the judge learned from his participation in the case. United States v Grinnell Corp., 384 US 563, 583 (1966); Bradley v Milliken, 620 F2d 1143, 1157 (6th Cir), cert den, 449 US 870 (1980); Shaw v Martin, 733 F2d 304 (4th Cir), cert den, 469 US 873, reh den, 469 US 1067 (1984). The federal standard for recusal of a judge is an objective one: whether a reasonable person, knowing all of the surrounding circumstances, would

consider the judge to be impartial. United States v Norton, 700 F2d 1072, 1076 (6th Cir), cert den, 461 US 910 (1983).

In the instant case, the trial judge's brief remark at sentencing that he thought that Petitioner was capably represented by trial counsel does not prove that his later consideration of the motion for new trial was unfair. The district court below correctly found that the judge's statement merely reflected his state of mind after presiding at the trial and in the context of a sentencing dialogue. Petitioner was not denied due process as a result of judicial bias.

C. Petitioner Was Not Denied The Effective Assistance Of Counsel.

In Strickland v Washington, 466 US 668 (1984), this Court enunciated the

standards by which to judge allegations of ineffective assistance of counsel in federal habeas corpus proceedings. Judicial scrutiny must be "highly deferential" and must begin with the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 US at 689. The burden of proof is on the petitioner to overcome the presumption of adequate assistance by identifying acts or omissions of counsel which are unreasonable in light of the facts of the particular case viewed as of the time of counsel's conduct. Id., 466 US at 690. A petitioner must show that counsel's performance was so deficient that it fell below "an objective standard of reasonableness" and was not "within the range of competence demanded of attorneys in

criminal cases." Id., 466 US at 687-688. Even after a demonstration of constitutionally deficient representation, the judgment of a criminal proceeding cannot be set aside unless the errors of counsel prejudiced the defense and were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., 466 US at 687.

Petitioner claims that his trial counsel was ineffective in several respects. The district court below outlined Petitioner's claims of ineffectiveness and found each to have been dealt with thoroughly in the Michigan Court of Appeals opinion. Holding the Michigan Court of Appeals opinion correct and adopting that opinion by reference, the district court rejected Petitioner's claim. The Sixth Circuit affirmed the

district court's finding that counsel was not ineffective and adopted the district court's opinion by reference.

The state and federal courts below correctly found that defense counsel conducted adequate and effective pretrial discovery; that while Petitioner was involved in the preparation of his defense, he had no constitutional right to review personally all relevant documents and evidence; that counsel's questioning of certain witnesses and failure to make certain objections at trial was valid trial strategy; and that the release of a psychiatric report concerning the Petitioner was not improper, nor did it "cause" Petitioner to decide not to testify at trial. Therefore, Petitioner was not denied the effective assistance of counsel.

RELIEF SOUGHT

For the foregoing reasons, Respondent respectfully urges that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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